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“THIS ONE’S FOR THE CHILDREN:” THE TIME HAS COME TO HOLD GUARDIANS AD LITEM RESPONSIBLE FOR NEGLIGENT INJURY AND DEATH TO THEIR CHARGES¹

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¹The beginning of this title is taken from the New Kids on the Block song, released in 1989 and titled “This One’s For the Children.” The author would like to thank Professor Barbara Tyler, Director of the legal writing department at Cleveland-Marshall College of Law, who helped to create part of the title.

The author wrote this note in response to one of her personal experiences. In 2000, the author’s family agreed to serve as foster parents for a nine-year-old boy. As customary for children who are temporarily in custody of the state in Guernsey County, Ohio, a guardian ad litem had been appointed by the courts to the child in order to determine what actions were in the best interest of the child. The guardian assigned was a local attorney who had performed the role of guardian for several other children in the community.

Unfortunately, the guardian failed to meet with the child throughout the duration of the child’s stay with the author’s family in spite of the fact that the child had to attend several semi-annual reviews, which are completed in order to determine what action should be taken with respect to the child, i.e. whether the state is going to leave the child in foster care or try to attempt reunification with a family member. The guardian’s failure to meet with the child was very disheartening. However, more detrimentally, the guardian would appear in court at the child’s hearings and report to the judge what action was in the best interest of the child although the guardian had never spoken with him. Finally, after the foster parents had complained for several months about the guardian’s performance, the guardian met with the child ten minutes before the child’s last semi-annual review, at which the court decided to return to the child to his grandparents’ home from which he had already been removed. The foster child moved to his grandparent’s house and now struggles with the lifestyle there. On several occasions, the child has been suspended from school and has had health problems. There have been threats to remove the child and place him in an institution because his actions are wildly out of control and his grandparents cannot maintain him.

The guardian’s utter lack of interest in the case and the child prompted the author to research what type of liability existed for a guardian who negligently represents his or her client. Surprised and disappointed by the results of that research, the author chose to write this note, focusing on the theme of holding a guardian ad litem responsible for negligent representation of child clients.

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I. INTRODUCTION

In March 2000, the Maine District Court appointed Lawrence Irwin, a member of the Maine State Bar who had previously represented other children, as a guardian ad litem² to five-year-old³ Logan Marr.⁴ Following Irwin's appointment as guardian, "Logan was an adjudicated dependent of The Department of Human Services and was involuntarily placed in the state's care and custody."⁵ In March, Logan was placed in a foster home; however, shortly after her arrival, she had to be removed from that home due to abuse. Soon after, the Department of Human Services placed Logan in a new foster home, which belonged to Sally Schofield.⁶ Tragically, within days of arriving at the Schofield's home, little Logan was once again physically abused and neglected. This abhorrent behavior continued until Logan died from suffocation when the foster mother decided to punish her by wrapping her up in duct tape.⁷

Outraged by the loss of her daughter and haunted by the thought of her daughter's pain and suffering, Christy Marr brought suit against Lawrence Irwin and several others, including the State of Maine and the Department of Human Services, raising numerous claims based on malpractice, negligence, and wrongful death.⁸ Her complaint against Irwin alleged that he failed to exercise many of his duties as Logan's guardian and that this failure constituted a direct and proximate cause of Logan's death.⁹ Some of the duties that Christy alleged Irwin failed to complete included the following: failure to perform an independent investigation of the

²A guardian ad litem is "appointed to represent an infant . . . [and] is regarded as an officer or agent of the court He or she is charged with the duty of protecting the rights and best interest of the infant, and, when appropriate, making recommendations to the court on the minor's behalf." 42 AM JUR 2D, *Infants* § 183 (2003).

³A.J. Higgins, *Lawmaker Fights DHS, State Court in Custody Case*, BANGOR DAILY NEWS, Nov. 3, 2003, at A1. This newspaper article recounts the death of Logan Marr and discusses the "blunders" that the Department of Human services made in attempting to protect Logan. The article suggests that Logan's guardian was acting in bad faith.

⁴The factual scenario used in the introduction of this paper is a summary of the background facts from *Marr v. Maine Dep't of Human Servs.*, 215 F. Supp. 2d 261 (D. Me. 2002).

⁵*Marr*, 215 F. Supp. 2d at 264.

⁶*Id.*

⁷Higgins, *supra* note 3.

⁸*Marr*, 215 F. Supp. 2d at 263-64.

⁹*Id.* at 264.

placements for the child in either foster home, failure to meet with Logan prior to any of her court hearings, failure to meet with Logan for a significant period of time or to meet with her in a neutral setting, and failure to discover or report the fact that Schofield was not a licensed foster parent at the time the child was placed with her.¹⁰ Finally, the complaint alleged that Irwin, who had previously acted as a guardian ad litem,¹¹ was “aware of the risk of harm attendant to the failure to monitor and control a child’s progress while in state care” and that he “failed to take easily available measures to address that risk.”¹²

In response to Marr’s complaint, Irwin filed a motion to dismiss. Irwin claimed that, as a guardian, he was protected by quasi-judicial immunity,¹³ which barred action against him related to his role as Logan’s guardian. The trial court recognized that the motion should be granted only if “in viewing the facts in the light most favorable to the claimant, it clearly appeared that the plaintiff could not recover.”¹⁴ However, the trial court granted Irwin’s motion to dismiss based on the rationale that a guardian is entitled to absolute immunity “from any suit for damages based on the performance of his duties within the scope of his appointment.”¹⁵ Thus, Irwin was not required to defend his actions or provide any evidence that he adequately performed his duties, even though his shortcomings arguably resulted in the abuse of Logan Marr.

¹⁰*Id.* at 264-65. In addition to Christy Marr’s allegations of Irwin’s omissions, she also alleged that Irwin had acted outside the scope of his authority and became involved with Logan’s placement. The complaint alleged that Irwin knew and was friends with Schofield. At the time that Logan was placed in the Schofield’s home, the foster parent was also serving as Logan’s adoption caseworker and she announced that she intended to adopt Logan. Irwin was allegedly aware of Schofield’s intention to adopt Logan and allegedly conspired to help terminate Christy Marr’s parental rights through negative reports, statements and testimony. Also, the complaint further alleged that after the child was placed in the Schofield home, the Director of the Bureau of Child and Family Services discovered that the placement violated the Department regulations because Schofield was a caseworker at the time Logan was placed with her. Upon discovering the Director’s intention to move Logan, Irwin scheduled a meeting with the judge and reported that he did not want the child moved. Irwin then told the Director, he would bring an action for a restraining order if she attempted to place the child in a different foster home. *Id.* at 265-66.

¹¹*Id.* at 264.

¹²*Id.* at 265.

¹³*Marr*, 215 F. Supp. 2d at 266. Irwin filed a rule 12(b)(6) motion to dismiss all counts against him on the grounds that plaintiff failed to state a claim upon which relief could be granted. Irwin alleged that he was protected by quasi-judicial immunity as a guardian ad litem and therefore argued that the case had to be dismissed.

¹⁴*Id.*

¹⁵*Id.* at 271.

Imagine the shock and anger that Christy Marr must have felt as the court summarily dismissed her case.¹⁶ Her daughter died because of what she perceived to be the guardian's failure, as well as that of several others, to detect and eliminate the ongoing abuse. The court, in granting Irwin's motion to dismiss, determined that protecting a guardian's absolute immunity privilege was more important than providing a grieving mother with a chance to discover the truth and to possibly obtain a remedy for the abuse and death of her daughter. Christy must have felt deprived of justice and perceived our legal system as a mockery.

Christy Marr's situation is not unique. Absolute quasi-judicial immunity,¹⁷ also called absolute immunity,¹⁸ is routinely granted to guardians who function within a quasi-judicial role.¹⁹ This immunity is granted to guardians to help ensure freedom in making impartial decisions regarding what action is in the best interest of a child without being subjected to fear of litigation from those offended by the guardian's decisions.²⁰ Regrettably, this immunity also allows guardians who act negligently to avoid the consequences of their actions and the burden of defending themselves all together.²¹ Absolute immunity leaves injured children and parents, such as Christy Marr,²² without recourse for a guardian's negligent actions.

¹⁶The District Court confirmed the Magistrate's recommendation to grant Irwin's motion to dismiss. Previously, Plaintiffs, the estate of Logan Marr and her mother, Christy Marr, brought this action for money damages against the Department of Human Services, an agency of the State of Maine, and Lawrence Irwin. The magistrate also granted the Department of Human Services' motion to dismiss. *Marr v. Me. Dep't of Human Servs.*, No. 01-224-B-C, 2002 U.S. Dist. LEXIS 7378 (D. Me. 2002). The District Court also affirmed that decision in *Marr v. Me. Dep't of Human Servs.*, No. 01-224-B-C, 2002 U.S. Dist. LEXIS 12604 (D. Me. 2002). Thus, Christy Marr's actions were denied as to both the Department of Human Services and Logan's guardian ad litem, Lawrence Irwin, leaving her without recourse against either party.

¹⁷The following is a definition of absolute quasi-judicial immunity:

[A] guardian ad litem, as an officer of the court, is a public officer, and as such, has been held to be protected by quasi-judicial immunity in a number of instances...When acting in a quasi-judicial or discretionary matter, a public officer is usually given immunity from liability to persons who may be injured as the result of an erroneous or mistaken decision, however erroneous his judgment may be, provided the acts complained of are done within the scope of the officer's authority, the officer is acting in good faith, and without willfulness, malice, corruption, or oppression in office.

Susan L. Thomas, Annotation, *Liability of Guardian ad Litem for Infant Party to Civil Suit for Negligence in Connection with Suit*, 14 A.L.R.5th 929 (1993).

¹⁸In this paper, the term absolute quasi-judicial immunity will be shortened and referred to as "absolute immunity" for the purposes of convenience and space limitations.

¹⁹42 AM JUR 2D, *Infants* § 196 (2003).

²⁰*Short v. Short*, 730 F. Supp. 1037, 1038 (D. Colo. 1990).

²¹Thomas, *supra* note 17. This A.L.R. article provides a summary of the absolute immunity doctrine and attempts to clarify under what circumstances absolute immunity will be granted to a guardian ad litem. The article discusses some of the pivotal cases that attempt to explain when guardians have been afforded absolute immunity in the past and what possible exceptions to that rule exist. Thomas writes about the one exception in the area, which is based on the theory that when a guardian ad litem is viewed as acting as an advocate instead of as a functionary of the court he or she will not be granted absolute immunity. The article also

Absolute immunity has historic justifications but it also represents one of the major failures of the modern child welfare system. Attorneys who act as guardians are granted absolute immunity, which serves as a shield that excuses them from being accountable for the consequences of their actions. Without presentation of a defense, all the parties involved are left to speculate as to whether the guardian adequately performed the necessary duties to protect the child. Immunity also perpetuates maintenance of the status quo rather than moving toward improved systems of care and accountability.

Section II of this note provides an overview of the current guardian ad litem system. Section III summarizes the origin and evolution of the absolute immunity doctrine. Section IV discusses instances where courts have chosen not to grant absolute immunity. Section V discusses and critiques the mechanisms in place to prevent abuses of absolute immunity. Section VI proposes suggestions for improving the current guardian ad litem system, including an alternative possibility to granting absolute immunity to produce more equitable results. Finally, section VII provides a brief conclusion and summary.

II. THE GUARDIAN AD LITEM SYSTEM

A guardian ad litem is “a person appointed by the court during the course of litigation, in which an infant or a person mentally incompetent is a party, to represent and protect the interests of the infant or the incompetent.”²³ While this definition may seem fairly straightforward, many guardians and others in the legal profession have been confused over the specific steps necessary to adequately represent and protect the interests of an infant or incompetent. As one author explains, “it may sound simple enough the guardian ad litem ascertains and advocates the best interest of the child, but the exact nature of that role has always been and continues to be subject to great debate among reasoned and educated minds.”²⁴ To clarify some of the confusion that currently exists, this note evaluates the guardian ad litem system in a two-step process. The first step requires defining who can perform the role of guardian, while the second attempts to alleviate some of the confusion by deciphering what role the guardian is supposed to play.

briefly discusses that no duty exists to a minor's parents for negligent representation of a guardian. Finally, the article also provides various “practice pointers” for those representing a child as a guardian ad litem. The advice differs on the basis of whether a guardian is representing a child in “jurisdictions where the grant of quasi-judicial immunity is based on a functional analysis” or whether the guardian is representing a child in jurisdictions where a guardian acts as a legal advocate for the child.

²²See generally *Marr*, 215 F. Supp. 2d 261.

²³BALLENTINE'S LAW DICTIONARY 540 (3d ed. 1969).

²⁴Charles T. Cromley, Jr., “[A]s Guardian Ad Litem I'm In a Rather Difficult Position,” 24 OHIO N.U. L. REV. 567-68 (1998). This note focuses on determining the role of a guardian ad litem in Ohio and provides one section of in-depth review of the Ohio history of a guardian ad litem.

A. Laws Mandating Appropriation of a Guardian

Until 1974 and the passing of the Child Abuse Prevention and Treatment Act (“CAPTA”),²⁵ the practice of appointing guardians for minors was fairly limited.²⁶ As of 1973, only two states required the appointment of a guardian for children involved in abuse cases. In response to such inadequate representation, Congress enacted CAPTA to address the apparent need for better legal representation among children.²⁷ CAPTA was quite successful in bringing about better protections for abused and neglected children. The Act created the National Center on Child Abuse and Neglect, which provides federal funds to any state that established child abuse and neglect prevention treatment programs.²⁸ The Act also required that obtaining federal funding was conditioned upon a “provision for the appointment of an individual appointed to represent a child in judicial proceedings”²⁹ being included in the prevention and treatment program.³⁰ The legislators who created CAPTA hoped that providing guardians to all abused and neglected children would provide direct aid to children in dire need of it. As one study reports “the rationale for the appointment of a GAL³¹ in civil and criminal abuse and neglect proceedings was that each child involved in judicial proceedings needs an independent voice to advocate for his/her ‘best interests.’”³²

²⁵42 U.S.C. §§5101-5106i, 5116-5116i (2003).

²⁶George S. Mahaffey Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J. L. & FAM. STUD. 279 (2002). While this article focuses on the issue of immunity for the guardian in the District of Columbia, it provides an excellent succinct history of the guardian’s role and a description of the various sources of a guardian’s immunity. It also provides an in-depth look at some of the cases, which address the issue of immunity for guardians, including *Short*, *Kurzawa*, *Collins*, and various other cases.

²⁷Robert E. Shepherd, Jr. & Sharon S. England, “*I Know the Child is My Client, But Who Am I?*” 64 FORDHAM L. REV. 1917 (1996). Professor Shepherd and Ms. England, who graduated from law T.C. Williams School of Law and who has been a practicing social worker, social work instructor and President of the CASA Board of Directors, wrote this article in 1996. It addresses the problems in the guardian ad litem system. The article is a great source for information and provides many citations to various guardian ad litem studies and materials on guardian representation.

²⁸42 U.S.C. § 5106(a).

²⁹*Id.*

³⁰Shepherd, *supra* note 27, at 1921.

³¹The author of the study uses the term GAL in this sentence, which is a shorthand term for guardian ad litem.

³²U.S. Dep’t of Health and Human Services, Representation for the Abused and Neglected Child: Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem 1-2 (1993) [hereinafter, Final Report]. Due to the absence of clear role definitions, Congress mandated the National Center on Child Abuse and Neglect to conduct a study of the effectiveness of guardian ad litem representation. They conducted this research in a two-phase study. This final report is the second phase of the study and it was designed to measure the “effectiveness of GAL representation and to validate selected Phase I findings.” *Id.* The final study is reported in two volumes and the second volume is titled “Appendix A” and provides the full phase I report.

Since the enactment of CAPTA, some states have taken the initiative even further by requiring guardian representation in cases where a child is involved in “a paternity action, a custody dispute, litigation over child support payments, visitation rights, adoption, or commitment to foster care or to a mental institution.”³³ Thus, the practice of appointing guardians for children in various legal situations, not solely those involved in abuse and neglect cases, has increased since the enactment of CAPTA. While some states have done more than others, most of them, after CAPTA was passed, have created at a minimum prevention and treatment programs.³⁴ Although CAPTA listed the basic requirements that must be met to collect federal funding, it failed to restrict or elaborate on requirements such as “who can serve as a guardian or what role that individual should play.”³⁵

B. Who Can Serve as a Guardian

Various people can fulfill the role of guardian. For example, the child’s parent, legal guardian, or relative may serve as guardian, and most states will also allow persons who have an interest in the child’s welfare to fulfill the role.³⁶ However, while any of the aforementioned can technically perform the role, choosing a parent or relative as guardian may not be the best choice for the child. Often, a parent or relative may be unable or unwilling to fulfill the role. Moreover, in a majority of cases in which a guardian would be required, the parent or relative may have interests that conflict with the infant’s interest.³⁷ A child’s interest also conflicts with a parent’s or relative’s interests when a child sues a parent, a minor seeks an abortion or other medical treatment without parental consent, or most commonly when the child is one subject of an abuse or neglect claim against the parents or relative.³⁸ In those situations, the court should appoint an independent guardian for the infant.³⁹ Because the most important duty of the guardian is the representation of the child’s separate interests, the court must appoint an unbiased representative for the child.⁴⁰ As one author aptly states, “the most important aspect of a guardian ad

³³LAUREN KROHN ARNEST, *CHILDREN, YOUNG ADULTS, AND THE LAW: A DICTIONARY* 150 (2000). This book provides an overview of various aspects of child representation, including a three page summary of the history and duties of a guardian ad litem. The author states that this book is an attempt to provide a “general compendium” that describes “most of the important legal issues affecting children and to distill the most common approaches of all the various jurisdictions that have laws on these subjects.”

³⁴*Id.*

³⁵U.S. Dep’t of Health and Human Services, Administration for Children, Youth and Families, National Study of Guardian Ad Litem Representation (1990) [hereinafter, National Study]. After the U.S. Congress recognized the need for information on guardian representation, it put together a group to conduct a study to determine how each state provided guardian representation. This report summarizes the results of that study as well as suggests proposed recommendations for establishing a better system of guardian representation.

³⁶ARNEST, *supra* note 33, at 151.

³⁷*Id.*

³⁸*Id.*

³⁹42 AM JUR 2D, *Infants* § 161 (2003).

⁴⁰ARNEST, *supra* note 33, at 151.

litem is that he or she represents the separate interest of the child. If the child's interest in a legal matter differ from those of his or her parents . . . the parent . . . may not serve as the child's guardian ad litem."⁴¹

Following the enactment of CAPTA, attorneys generally performed the role of guardians even though the Act did not specifically provide that all guardians had to be attorneys. In the late 1970's, however, because no provision prevented the use of volunteers and because they were most likely easier to obtain than attorneys, some states began to train and appoint lay volunteers to serve in this role.⁴² Consequently, other states began to develop volunteer guardian programs, and thus the national system has evolved to include the use of private attorneys, public defenders, Legal Aid attorneys, social workers, Court Appointed Special Advocate ("CASA") volunteers, and other individuals to act as representatives for children.⁴³ Due to the various options available for representation, most states do not have consistent representation systems and "variation is the norm" among and within the states. Indeed, even neighboring counties often have differing methods of appointing, compensating, and training guardians.⁴⁴ Some jurisdictions require that all guardians must be attorneys while others provide that a guardian may be either an attorney or a volunteer.⁴⁵ This note primarily focuses on attorneys who act as guardians as opposed to lay volunteers.

C. Confusion over the Guardian's Role

Historically, an adult appointed to represent a child defendant was known as a guardian ad litem while an adult appointed to represent a child plaintiff in a lawsuit was given the name "next friend."⁴⁶ Today, the term guardian ad litem refers to "an adult who represents the legal interests of a child or other person lacking the ability to represent himself or herself."⁴⁷ Thus, the term now describes all circumstances in which the child is a participant in a legal proceeding, whether as a defendant, a plaintiff, or the subject of an abuse and neglect case.⁴⁸ Because the guardian's role has expanded to include "all phases of proceedings that might affect the child's welfare,"⁴⁹ many states are "increasingly splintering" on what type of role the guardian should perform. Consequently, much confusion and debate has arisen in the area,⁵⁰ and attempting to determine how to classify a guardian's role has become

⁴¹*Id.*

⁴²National Study, *supra* note 35.

⁴³*Id.* at 9.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶ARNEST, *supra* note 33.

⁴⁷*Id.* at 150.

⁴⁸*Id.*

⁴⁹*Id.* at 152.

⁵⁰Margaret Graham Tebo, *The Most Vulnerable Clients: Attorneys Must Deal With Special Issues When Kids Come Into Contact With the Courts*, 89 A.B.A.J. 48 (2003). Margaret Graham Tebo is a lawyer and a senior writer for the ABA Journal. In this article she discusses

increasingly difficult. One author describes determining the guardian's role as "perhaps the most hotly debated issue in the child protective system today."⁵¹

Not only has expansion of the guardian's role created difficulty in attempting to define the function of a guardian, but also, as previously noted, CAPTA does not specifically define "who can serve as a guardian or what role that individual should play,"⁵² thus compounding the confusion. As no specific requirements were created as to how states should develop their respective guardian programs, states and even counties within those states have created differing systems. As a national study undertaken to evaluate the effectiveness of the guardian system found, "a lack of legislative guidance and disagreement among and within States regarding how best to provide this representation has resulted in a chaotic and inconsistent system of GAL representation."⁵³ The result of this chaos is that guardians are not performing their duties as effectively as possible and are unsure on how to proceed when appointed to represent children.

Most statutes designed to implement a guardian program establish a general definition of a guardian's primary task. For example, many statutes define the guardian's role in terms of promoting, advocating, or representing the child's best interest.⁵⁴ While this attempt at defining a guardian's role serves as a starting point, much uncertainty arises when trying to determine how a guardian promotes, represents, or advocates for a particular child's best interest. Unfortunately, there is often too little, if any, information to aid the guardian in ascertaining how to go about performing the assigned role. Seldom do guardians have written guidance as to the responsibilities that must be undertaken to provide adequate services to the child.⁵⁵ In this regard, one author reports, "neither CAPTA, its implementing regulations, nor many state statutes have adequately defined the roles or responsibilities of GALs."⁵⁶

At first blush, the task of determining what action to take to protect the best interest of a child may seem fairly simple. In some cases, however, this determination is not so clear. Because a guardian's primary duty is to represent a child's best interest, he or she may be forced to make decisions that conflict with a young client's expressed wishes.⁵⁷ For example, "a child represented by a guardian

several aspects of child representation including a section on the most "hotly debated issue in the child protective system today," which is the role of a guardian ad litem. She explains in the article that states are "increasingly splintering in how they apply the concept," which may often cause confusion and "leave a guardian unsure of how to proceed." The article then explains that the ABA Family Law Section has proposed some standards that guardians, should adhere to when representing a child as guardian ad litem. Tebo explains that the committee hopes the list will be used to clarify a guardian's role and to aid guardians by suggesting how to go about representation in these types of cases.

⁵¹*Id.*

⁵²National Study, *supra* note 35.

⁵³*Id.* at 1.

⁵⁴Shepherd, *supra* note 27.

⁵⁵National Study, *supra* note 35 at 23.

⁵⁶Shepherd, *supra* note 27.

⁵⁷ARNEST, *supra* note 33, at 152.

ad litem may express a wish to return to an abusive home, even though this is not in his or her best interest.”⁵⁸ In such cases, the guardian faces a dilemma of whether to act as an advocate for the child and represent the child’s wishes or to represent the child by advocating for a decision which, although ultimately in the best interest of the child, is directly adverse to the child’s wishes.⁵⁹ This is one of the common problems that guardians face: determining whether to act as an advocate for the child or to act as an arm of the court by attempting to ascertain what action is in the best interest of the child. Often, when a guardian is appointed, there is little or no guidance as to which role he or she is to perform. This lack of guidance leaves guardians unsure about how to proceed. This uncertainty, in turn, leads to representation that proves inadequate in cases like that of Logan Marr.

Attorney and author Margaret Tebo identifies two distinct ways to classify a guardian’s role, and further explains that these two roles hold different responsibilities and duties. Tebo contends that a guardian can be “charged with determining the child’s best interest” or charged by the court with the duty of acting “solely as the child’s legal advocate.”⁶⁰ If an attorney is charged with the duty of determining the child’s best interest, then “the attorney must investigate the child’s circumstances and recommend to the court whether the state or someone else, such as a parent or other family member should have custody.”⁶¹ Conversely, when an attorney is acting solely as the child’s legal advocate, “the lawyer must zealously represent the child’s wishes with little regard to whether the lawyer believes those wishes to be in the child’s best interest.”⁶² While Tebo advocates a seemingly simple and workable resolution to the ongoing confusion over guardians’ roles, a problem still remains in the appointment stage. Many courts do not clarify these distinct roles and fail to charge a guardian with a specific role, thus leaving the guardian unsure of how to adequately represent a child.⁶³

Confusion surrounding the specific role the guardian is to undertake also presents problems in determining whether the guardian enjoys absolute immunity. The question of immunity turns on the type of role that the guardian performs. Thus, a guardian may believe that he or she is protected by absolute immunity only to discover that none existed. As one author explains, “the questions are urgent, and all the more portentous because the ascertainment of the specific role or function of the guardians ad litem is determinative of whether they will be afforded immunity from the personal liability that inevitably comes with the position.”⁶⁴ The history and evolution of the doctrine provides some guidance for determining whether absolute immunity applies to a guardian.

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰Tebo, *supra* note 50.

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴Mahaffey, *supra* note 26.

III. ORIGIN AND EVOLUTION OF THE ABSOLUTE IMMUNITY DOCTRINE

A. *Origins of Absolute Immunity*

While “the concept of a guardian ad litem dates back to the early Roman and English common law systems,”⁶⁵ the extension of absolute immunity for the protection of guardians is a relatively recent concept.⁶⁶ The Sixth Circuit’s 1984 decision in *Kurzawa v. Mueller*⁶⁷ was one of the earliest cases to discuss whether to grant immunity to a guardian.⁶⁸ Today, the *Kurzawa* case remains one of the most cited on the issue of absolute immunity.⁶⁹ In that case, John and Frances Kurzawa, parents who were both sight impaired, were having problems⁷⁰ with their son Cass. They sought assistance from the Michigan Department of Social Services.⁷¹ In response to their request, the Social Services Department removed Cass from the home and placed him into foster care. After a failed attempt at reunification, between Cass and his parents, and several hearings, the probate court terminated the Kurzawas’ parental rights; however, Cass’s parents appealed the decision and it was subsequently reversed.⁷²

The Kurzawas then brought suit against multiple defendants, including Clarke Baldwin, Cass’s guardian.⁷³ While the district court found that the defendants were

⁶⁵U.S. Dep’t of Health and Human Services, Representation for the Abused and Neglected Child: The Guardian Ad Litem and Legal Counsel (1980). Report provides an overview of guardian representation throughout history. It also discusses the “role of the representative in child abuse and neglect proceedings and focuses on the issues of who should represent the child and how effective representation can be accomplished.”

⁶⁶Thomas, *supra* note 17. This article provides an extensive analysis of the court’s decision and rationale in *Short*, 730 F. Supp. 1037, which granted absolute immunity to a guardian ad litem who is an integral part of the proceedings. See also National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.shtml> (last visited on February 8, 2004), which provides a short discussion of the absolute immunity afforded to the guardian ad litem in *Short*.

⁶⁷732 F.2d 1456 (6th Cir. 1984).

⁶⁸National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.shtml> (last visited on February 8, 2004).

⁶⁹Mahaffey, *supra* note 26.

⁷⁰*Kurzawa*, 732 F.2d at 1456-57. John and Frances Kurzawa both suffered from vision impairment. John was blind and Frances was only “partially-sighted.” They were experiencing problems controlling their son.

⁷¹*Id.*

⁷²*Id.* at 1457.

⁷³*Id.* The Lenawee County Probate Court terminated the Kurzawas’ parental rights and the Michigan Court of Appeals reversed that decision. *In re Kurzawa*, 290 N.W.2d 431 (Mich. Ct. App. 1980). After the appeal,

The Kurzawas brought an action pursuant to 42 U.S.C. §1983 and two pendant state claims against seven defendants. The two pendant state claims were brought pursuant to a Michigan statute which prohibits discrimination against handicapped persons and

entitled to immunity pursuant to the Supreme Court's decision in *Harlow v. Fitzgerald*,⁷⁴ the Sixth Circuit Court applied the reasoning of *Briscoe v. Lahue*,⁷⁵ which granted absolute immunity to agency officials that performed functions analogous to prosecutors.⁷⁶ The Sixth Circuit extended this immunity to protect Clarke Baldwin, whose position as guardian placed him "squarely within the judicial process" and in need of protection so that he could make decisions to act in the best interest of the child without worrying about possible harassment and intimidation

a common law allegation of negligence. Three defendants – Roger Hendricks, Joan Mueller and John Dempsey . . . were employees of the Michigan Department of Social Services who played various roles in removing Cass Kurzawa from his home and placing and maintaining him in foster homes or juvenile institutions. Three other defendants – Purza Onate, Angela Wallenbrock, psychiatrist and Kay Tooley, psychologist, had contact with the Kurzawas prior to the termination of their parental rights. Clarke Baldwin, the last defendant, is an attorney who was involved in the legal process in removing Cass Kurzawa from his home.

Id. at 1457.

⁷⁴457 U.S. 800 (1982). See also Mahaffey, *supra* note 26. Mahaffey summarizes the decision in *Harlow* as follows:

Under the rubric of quasi-judicial immunity, certain officers or officials or the judiciary are viewed as functioning as arms of agents of the court, such that they are entitled to immunity from personal liability. The obvious dilemma has been in ascertaining which officers or officials of the judiciary to extend immunity to and whether such persons should be afforded absolute immunity or qualified immunity. In attempting to alleviate the dilemma, the United State Supreme Court adopted a "functional approach" or "functions approach" in analyzing whether the acts of certain officials and officers were protected by absolute immunity or qualified immunity. Under the "functions approach" the activities undertaken by a particular officer or official are examine and quasi-judicial immunity is extended to those whose functions or involvement are so "judicial" or "judge like" that they are considered arms or agents of the court.

Mahaffey, *supra* note 26 at 282.

⁷⁵460 U.S. 325 (1983). See also Mahaffey, *supra* note 26. Mahaffey explains why the Sixth Circuit chose to apply the reasoning of *Briscoe* when deciding *Kurzawa*.

The Eastern District of Michigan found that Clarke and several other social services employees were entitled to immunity from liability under the United States Supreme Court's decision in *Harlow v. Fitzgerald*. Upon review, the United States Court of Appeals for the Sixth Circuit agreed that the defendants were entitled to immunity, but for a different reason. Rather than rely upon the *Harlow* decision, the Sixth Circuit Court of Appeals held that under *Briscoe v. Lahue*, persons who are "integral parts of the judicial process" are entitled to absolute immunity. The *Kurzawa* court reasoned that person who perform functions that are integral to the judicial process "must be able to make a decision . . . free from intimidation and harassment." With respect to Mr. Clarke, the court noted that as a guardian ad litem, Clarke must "act in the best interest of the child he represents. Such a position clearly places him squarely within the judicial process to accomplish that goalConsequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in the judicial proceedings."

Mahaffey, *supra* note 26 at 284-85.

⁷⁶*Kurzawa*, 732 F.2d at 1458.

from dissatisfied parents.⁷⁷ Thus, after *Kurzawa*, the court perceived a guardian as an integral part of the judicial proceedings entitled to the protections of absolute immunity.⁷⁸

B. Evolution of Absolute Immunity

Following the decision in *Kurzawa*, most courts have continued to apply the principle that all guardians should be granted absolute immunity.⁷⁹ In the 1990 case of *Short*,⁸⁰ for example, the Colorado district court, adhering to the theory set forth in *Harlow*, held that a court-appointed guardian was protected by absolute immunity.⁸¹ In that case, the court granted one guardian's motion to dismiss a legal malpractice claim.⁸² The court observed that a guardian is an integral part of the proceedings and thus should be protected from suits that arise out of the performance of his or her duties.⁸³ The court reasoned that the importance of granting immunity lies in the need for a guardian's judgment to remain impartial and unaltered by the "intimidating wrath" and "litigious penchant of disgruntled parents."⁸⁴

Since the decisions of *Kurzawa* and *Short*, courts have continued to grant absolute immunity to guardians even in light of some terrifying factual allegations. In the 1997 Wisconsin case of *Berndt v. Molepske*,⁸⁵ for example infants who were sexually abused by their father after he was awarded primary physical custody sued the guardian who had represented the children's interest in the divorce and custody proceedings. The Wisconsin court of appeals summarily dismissed the case, holding that the guardian had absolute immunity for the alleged negligent performance of his duties. No further investigation was conducted, and there was no further inquiry as to what actions the guardian took or failed to take to avoid this tragedy.

Another case that demonstrates the courts' willingness to dismiss allegations of guardians' negligence and grant absolute immunity is the 1997 Nebraska case of *Billups v. Scott*.⁸⁶ In *Billups*, a father brought action against an attorney who had

⁷⁷*Id.*

⁷⁸Mahaffey, *supra* note 26.

⁷⁹*Id.* See also National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.shtml> (last visited on February 8, 2004) (citing to and elaborating on various other cases in which the courts have continued to grant guardians the protections of absolute immunity).

⁸⁰*Short*, 730 F. Supp. 1037.

⁸¹*Id.* In *Short*, Plaintiff Mary Oosterhous filed a complaint on behalf of her children alleging that Defendant, Peggy Jessel, guardian, negligently performed her duties as a court appointed guardian of her four minor children, who had been abused. See also Thomas, *supra* note 17 for a recitation of the facts and the court's analysis.

⁸²*Short*, 730 F. Supp. 1037.

⁸³*Id.*

⁸⁴*Id.* See also Thomas, *supra* note 17, which discusses the court's reasoning as it decided to grant absolute immunity to the guardian. It also discusses the mechanisms, which are in place to prevent abuses of such immunity.

⁸⁵565 N.W.2d 549 (Wis. Ct. App. 1997).

⁸⁶571 N.W.2d 603 (Neb. 1997).

served as his child's guardian, alleging that due to the guardian's negligence in failing to properly investigate, his child was placed into a home with an ongoing history of abuse. The district court sustained the guardian's demurrer and dismissed the action. Subsequently, the Nebraska Supreme Court held that a guardian is entitled to absolute immunity for *any* suit for damages based on performance of duties.

Some courts, however, have refused to generously apply the principles set forth in *Kurzawa*. For instance, in the 1991 case of *Collins v. Tabet*,⁸⁷ when faced with the question of whether to extend immunity to guardians, the New Mexico Supreme Court agreed that absolute immunity should only be extended to guardians under certain circumstances.⁸⁸ In *Collins*, a guardian "was appointed at the request of the attorney for the plaintiffs, the minor and his parents, because of a perceived conflict of interest between the child and his parents with regard to the settlement of a medical malpractice complaint."⁸⁹ The guardian obtained a payment of \$46,000 for the family in exchange of a release of liability for the hospital; however, after the plaintiff-parents, represented by a different attorney, won a multimillion-dollar award in damages, with 60 percent of the liability being attributed to the hospital, the plaintiffs were precluded from collecting from the hospital due to the previous settlement.⁹⁰ As noted previously, a guardian is generally immune from liability; in *Collins*, however, the court created a way for some guardians to be sued for their negligent actions. Ultimately, the court held that a guardian who is appointed with court approval, who performs an investigation on behalf of the court, is absolutely immune from liability for those actions taken pursuant to the appointment.⁹¹ Conversely, the court held that if the guardian's appointment "does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, then the guardian is not immune and may be held liable under ordinary principles of malpractice."⁹² The court provided that guardians who perform as an "arm of the court"⁹³ are absolutely immune but once a guardian steps out of that role and becomes a private advocate, he or she is no longer immune.⁹⁴

⁸⁷806 P.2d 40 (N.M. 1991).

⁸⁸*Id.* See also Mahaffey, *supra* note 26, providing an analysis of the court's reasoning in choosing to limit the granting of absolute immunity under certain circumstances.

⁸⁹Thomas, *supra* note 17.

⁹⁰*Id.*

⁹¹*Collins*, 806 P.2d at 44.

⁹²*Id.*

⁹³*Id.* at 45.

⁹⁴*Id.* Here, the New Mexico Supreme Court held that a guardian would be liable for actions taken pursuant to settlement if the guardian's appointment contemplated investigation on behalf of court, that more factual inquiry was necessary to determine the nature of the guardian's appointment in this case and to what extent he functioned within that scope, and that the guardian breached his duties and such negligence was respective cause of the child's damages. Mahaffey, *supra* note 26. Also, Susan Becker, professor at Cleveland-Marshall College of Law, notes the following irony present in the Marr and Collins' cases. In Collins, the guardian was liable because the child lost money while in Marr the guardian was not liable

Generally, a guardian will not be answerable to the child for negligent performance. However, for courts that follow *Collins*, determining whether a guardian is answerable for that negligence turns on whether a guardian is acting as an “arm of the court or a private advocate.”⁹⁵

Recall that absolute immunity serves as a complete bar to the burden of defending oneself.⁹⁶ Therefore, when a guardian is granted absolute immunity, he or she will not be liable to persons injured as a result of erroneous or mistaken decisions, no matter how erroneous the judgment may have been.⁹⁷ Furthermore, some courts have gone so far as to suggest that absolute immunity also bars suits for grossly negligent or reckless acts as well.⁹⁸ As *Short* and other cases suggest, the importance of granting immunity lies in the need for a guardian’s judgment to remain impartial and unaltered by the “intimidating wrath” and “litigious penchant of disgruntled parents.”⁹⁹ However, after noting this, pursuant to the need to protect guardians, the *Short* court alternatively noted that a public policy concern of preserving accountability may arise when immunity is granted.

IV. MOVING AWAY FROM GRANTING ABSOLUTE IMMUNITY

The previous cases illustrate that the current system, which grants absolute immunity to guardians, may provide too much protection in various circumstances. Courts have recognized that in certain circumstances, granting absolute immunity may not be the right course of action, and that sometimes it becomes necessary to hold a guardian liable for his or her actions. In the 1998 case of *Tara M. v. City of Philadelphia*¹⁰⁰ for example, a federal appeals court refused to dismiss a negligence claim against a guardian.¹⁰¹ After suffering through years of abuse from various foster parents, Tara M. brought action under the federal Civil Rights Act, 42 U.S.C. § 1983, against several agencies responsible for child welfare for their negligent handling of her case.¹⁰² The defendant agencies filed a third-party complaint against Tara’s guardian and asserted that the guardian had breached state-law duties in her negligent representation, and therefore, the defendants were entitled to contribution from the guardian.¹⁰³ The guardian moved for dismissal of the third-party complaint,

where the child lost her life. This suggests a misguided distinction as to what under circumstances immunity may be granted.

⁹⁵Thomas, *supra* note 17.

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*See, e.g.,* Fleming v. Absill, 483 S.E. 2d 751,755 (S.C. 1997).

⁹⁹*Short*, 730 F. Supp. at 1037. *See also* Thomas, *supra* note 17, which provides an in-depth recitation of the *Short* facts and analysis.

¹⁰⁰145 F.3d 625 (3d Cir. 1998).

¹⁰¹*Courts Allows Suit Against Guardian*, 84 A.B.A.J. 41 (August 1998). This one-page article provides a brief commentary on the *Tara M.* decision and possible implications for the future about immunity and guardians.

¹⁰²*Tara M.*, 145 F.3d at 626.

¹⁰³*Id.*

asserting that as a court appointed guardian, she was entitled to absolute immunity.¹⁰⁴ The district court denied the motion to dismiss and the Third Circuit affirmed that decision, holding that the guardian “is not entitled to federal immunity from the contribution claim of the city defendants.”¹⁰⁵ Similarly in *Marquez v. Presbyterian Hospital*,¹⁰⁶ a New York state court held that “the proper standard where there are very young children, and the guardian . . . role predominates, is that liability should attach only if there is a showing that the law guardian failed to act in good faith or failed to exercise any discretion at all.”¹⁰⁷ This holding suggested that a guardian might be held accountable in negligence even though he or she was acting within the traditional protections afforded by absolute immunity.¹⁰⁸

V. EXISTING MECHANISMS TO PREVENT ABUSES OF IMMUNITY

In recognition of the public policy concern of preserving guardian ad litem accountability, the Colorado District court that decided *Short*¹⁰⁹ listed five mechanisms that serve to prevent potential abuses of absolute immunity. The mechanisms are: 1) “immunity attaches only to conduct within the scope of a guardian ad litem’s duties,” 2) “the appointing court oversees the guardian ad litem’s discharge of those duties, with the power of removal,” 3) “parents can move the court for termination of the guardian,” 4) “the court is not bound by and need not accept the recommendations of the guardian,” and 5) “determinations adopted by an appointing court are subject to judicial review.”¹¹⁰

These mechanisms are not, however, sufficient to deter guardians from negligently representing their clients. They are problematic because they are overly broad, providing too much protection. For example, one mechanism suggests that immunity attaches to conduct only within the scope of a guardian ad litem’s duties;¹¹¹ hence, this immunity attaches to most if not all of the duties that a guardian must complete to determine a child’s best interest. To determine the best interest of a child, guardians must perform several tasks, such as meeting with the child in an age-appropriate environment and developing and maintaining an attorney-client relationship.¹¹² Presumably, a guardian could negligently perform or fail to perform

¹⁰⁴*Id.* at 627.

¹⁰⁵*Id.* at 629.

¹⁰⁶608 N.Y.S.2d 1012 (N.Y.S.2d 1994).

¹⁰⁷*Id.* at 1018. See also National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.shtml> (last visited on February 8, 2004) (providing a short section on those courts who have rejected the idea of granting absolute immunity to guardians).

¹⁰⁸National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.html> (last visited on February 8, 2004).

¹⁰⁹*Short*, 730 F. Supp. at 1037.

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²ABA STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA’S CHILDREN STILL AT RISK 204-05 (2001). This publication is an “unprecedented collaborative

any of these duties and not be liable for resulting injuries as the conduct was performed within the scope of duty. Here, absolute immunity provides too much protection for the guardian and not any for the child.

Another reason the mechanisms do not provide adequate protection lies in the unrealistic expectations they encompass. For example, *Short* suggests that an “appointing court can oversee and remove the guardian.”¹¹³ However, this mechanism is highly problematic because a judge’s docket is often overburdened and will not afford any opportunity to oversee the guardian. Even if a judge had sufficient time to supervise guardians, given the duty to ascertain and protect the rights of the infant, and to bring those rights directly under the consideration of the court for decision,¹¹⁴ the judge may be inclined to rely on the guardian’s decision because the guardian is acting as an “arm of the court.”¹¹⁵

Furthermore, any judge would have a difficult time discovering whether or not a guardian was performing negligently because those who might be in a position to observe negligent behavior do not have the opportunity to fully monitor the situation. In an abuse and neglect case, for example, a social worker often does not have the opportunity to observe and oversee the guardian as the social worker is trying to manage large case loads involving many other children.¹¹⁶ The child generally is not in a position to understand and report on the guardian’s role. Finally, the parents, those who would be the most likely candidates to report a guardian’s negligence, are often seen as “disgruntled,”¹¹⁷ and biased against the guardian who holds an opinion contrary to their own regarding the child’s best interests.

effort conducted on behalf of children by the ABA Steering Committee on the Unmet Legal Needs of Children.” The Committee on the Unmet Legal Needs of Children is the successor to the American Bar Association’s Presidential Working Group on Children and Families, that released *America’s Children at Risk: A National Agenda for Legal Action*. The book highlights the ABA’s and state and local bars’ efforts in implementing projects since the release of *America’s Children at Risk* and “dramatically depicts the unresolved legal issues that face our nation’s children today.” Chapter four specifically addresses the issues of child representation and advocacy.

¹¹³*Short*, 730 F. Supp. at 1037.

¹¹⁴Thomas, *supra* note 17.

¹¹⁵*Collins*, 806 P.2d 40.

¹¹⁶Interview on 11/20/2003, with Pamela Daikar-Middaugh, who has practiced as a guardian ad litem for approximately ten years in Cuyahoga County and who currently serves as the Cleveland-Marshall College of Law *Pro Bono* program director. This thought arises in the context of the course of our conversation discussing how the guardian ad litem system functions in Cuyahoga County. In her experience working as a guardian ad litem, Mrs. Daikar-Middaugh often observed that social workers are extremely overburdened and do not have the opportunity to oversee a guardian. She also noted that a judge will almost always look to the guardian ad litem’s recommendation as to what action is in the best interest of the child because the guardian is specifically appointed for that reason. Finally, she explained that judges in Cuyahoga County are much more reliant on guardians and feel comfortable working with them because the guardian must be an attorney. Thus judges are more comfortable with accepting the opinion of an attorney who understands and functions within the judicial system.

¹¹⁷*Short*, 730 F. Supp. 1037.

Short suggests that these “procedural safeguards” are enough to “make threat of civil liability unnecessary.”¹¹⁸ However, the recurring criticisms listed herein and the continued occurrences of tragic cases, such as that of Logan Marr, suggest that these procedural safeguards are woefully inadequate and that fear of civil liability is actually quite necessary.

VI. SUGGESTIONS FOR IMPROVING THE CURRENT SYSTEM

Unfortunately, many children will be involuntarily forced into the judicial system throughout the year. The American Bar Association (“ABA”) reports that over 200,000 children will be tried in adult courts this year, while the government reports that more than a half-million children are in foster care nationwide.¹¹⁹ Furthermore, many divorce proceedings will turn into contentious custody battles, and adult criminal prosecutions for crimes such as physical and sexual abuse often involve young victims.¹²⁰ For children involved in these types of cases, the protection that only a qualified and contentious guardian ad litem can give is imperative to ensure the child’s well being. When a guardian fails to provide this protection, in the interest of fairness, accountability should be required.

The growing number of children involved in litigation and the inadequate existence of mechanisms to prevent abuses of immunity suggest that several changes should be implemented to produce a more effective system. Research indicates that systemic and individual attorney problems have contributed to the inadequate representation of children.¹²¹ Alleviating these individual and collective problems that lead to poor representation is imperative in providing better representation for children who are appointed guardians because they cannot defend themselves. The first proposed change addresses the systemic problems of confusion regarding the appropriate role of the guardian. The second suggested change addresses the problems of individual attorneys providing poor representation. The implementation of these suggested changes would help alleviate confusion, provide improved representation for children, and deter guardians from performing their duties in a negligent manner.

A. Clarifying the Confusion

“Ultimately, the lack of clear guidelines for responsibilities can lead to inadequate representation for the child.”¹²²

First and foremost, each jurisdiction needs to clarify the specific role that the guardian is going to perform. After clarification of the role, additional information and training should be provided as to the responsibilities and duties of the guardian. As one of the recommendations of the national studies on the guardian ad litem system suggests: “A uniform description of the role and responsibilities of the GAL

¹¹⁸*Id.*

¹¹⁹*Tebo, supra* note 50.

¹²⁰*Id.*

¹²¹*Shepherd, supra* note 27 at 1925.

¹²²National Study, *supra* note 35 at 41.

is needed within local jurisdictions . . . the description should lay out the minimum efforts and activities that are to be performed by the GAL. In addition, this description should contain guidelines for distribution of responsibilities.”¹²³ This task need not be that difficult as jurisdictions can clarify the role by using a standard already in place, such as the one author Tebo suggests. The guardians’ roles should be classified into two separate categories: guardian as advocate, with duties of zealously representing the child’s wishes;¹²⁴ and the guardian who attempts to determine best interests, with duties of investigating and reporting on the child’s circumstances.¹²⁵ Each jurisdiction should provide additional clarification by compiling comprehensive lists, similar to those the ABA has created, of recommended duties that every guardian should undertake when acting to determine best interest or acting as legal advocate of a child.

Jurisdictions could clarify the guardian’s role by enacting new rules to explain the guardian’s duty. Courts can also become active participants in helping to alleviate confusion. Guidance for courts and legislators is provided by the ABA, which developed and adopted Standards of Practice for Lawyers Representing Children in Custody Cases. The Council of the ABA Family Law Section unanimously approved these standards in May 2003.¹²⁶ Among those adopted Standards were suggestions on how to improve the current system of child representation.¹²⁷ The Custody Standards, as well as the Abuse and Neglect Standards previously approved by the ABA, recognize the importance of having the courts aid in attempting to improve the system. “Courts are crucial to the implementation of change No matter what standards or guidelines are adopted for lawyers, there can be little improvement in practice unless judicial administrations and judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers.”¹²⁸ Thus, because courts are

¹²³Final Report, *supra* note 32.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶Linda D. Elrod, *Raising the Bar for Lawyers who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105 (Summer 2003). This article discusses the ABA Standards of Practice for Lawyer Representing Children in Custody Cases, “which were unanimously approved by the Council of the ABA Family Law Section on May 2, 2003, after nearly a ten-year drafting process.” It also discusses the problems of representation today and how to fix some of those problems and create a better system for representation in child custody cases. There is an ABA counter-part produced to deal with children involved in abuse and neglect cases.

¹²⁷*Id.* Some of the proposals suggested for better representation for the children include providing clarification on the duties of all lawyers for children. The ABA committee clarifies by providing lists of the “representative duties” that that all lawyers should undertake when representing children. For example, the lawyer “should inform the parties and their counsel of the lawyer’s role in the case should conduct discovery; develop a strategy of the case; stay apprised of other court proceedings affecting the child take any necessary action to expedite proceedings” The Committee also discusses what types of mandatory training requirements should be required for attorneys who represent children. Elrod notes that, “Lawyers who represent children need specialized training. A bar card is not sufficient.”

¹²⁸*Id.* at 129.

pivotal to success in this area, having judges clarify the role the guardian must undertake should help alleviate some of the confusion that currently exists and provide for overall better representation.

Although clarification is an important step in providing better representation, additional training, information, and resources should be offered to make the representation even stronger. Guardian training should elaborate on the specific duties and responsibilities that lawyers as advocates or lawyers who are to determine best interest should undertake in their respective roles. The ABA Custody Standards recognized that “lawyers who represent children need specialized training.”¹²⁹ The ABA notes that lawyers, who act on behalf of children, need to learn special skills such as how to communicate with those children.¹³⁰ Lawyers should also be knowledgeable about children’s development needs and abilities, know how to prepare and present children’s viewpoints and be aware of relevant state and federal laws, agency regulations and legal standards applicable to child-related litigation.¹³¹ The ABA identifies additional required skills and knowledge that attorneys who represent children should possess. Because many guardians may not have this knowledge, further training sessions and information could be of use and could help to alleviate some of the uncertainty as to what actions to take in specific situations, thus lessening the potential for inadequate representation.

Another issue that confuses many guardians is the issue of liability. As previously noted, courts have generally determined that when a guardian is acting on behalf of the court, attempting to discover what action is in the child’s best interest, the guardian is entitled to absolute immunity. Thus, even if a guardian is grossly negligent in failing to undertake important duties to determine best interest, an injured child may not be permitted to bring a malpractice suit if the actions complained of were within the scope of the guardian’s authority.¹³² The over-expansive protection that absolute immunity provides encourages inadequate representation. Often times, guardians receive little respect or thanks for their work and their cases can continue for years with very minimal, if any, compensation.¹³³ Although many guardians attempt to provide reasonable representation for the children whom they are assigned, the lack of compensation, time, clarity about the role combined with over-expansive protection can lead to inadequate or non-existent representation. While the desire to grant protection to guardians is of great importance, providing absolute immunity, which prevents injured children from bringing suits, is not an effective or fair system.

¹²⁹*Id.* at 118.

¹³⁰*Id.* at 119.

¹³¹*Id.*

¹³²Thomas, *supra* note 17.

¹³³National Study, *supra* note 35.

B. From Absolute Immunity to Qualified Immunity

“Children should have *competent* legal counsel representing their interest in all significant judicial proceedings that affect their lives.”¹³⁴

Once the role of guardian has been clarified and better training and more information made routinely available, some of the problems with inadequate representation should be alleviated. However, the problem of individual attorneys who negligently represent their clients will likely continue to exist. Common problems involving attorney performance include inadequate investigation, inadequate contact with the child, and passivity about the disposition of the matters affecting the child.¹³⁵ Unfortunately, the lack of compensation and the protection granted by absolute immunity provide minimal incentive for guardians to put forth adequate measures for representation. Guardians are or should be aware of the responsibilities they take on when agreeing to represent a child. Furthermore, innocent children should not have to suffer the consequences of a guardian who does not prepare adequately for a case. The effect of a guardian inadequately performing his or her duties can as the Logan Marr case illustrates, result in catastrophic outcomes. Children have suffered physical and sexual abuse, neglect and even death due to a lack of ample investigation. Increasing accountability for a guardian's actions during representation of a child should lead to better representation of children. Guardians who take on the role will be assured that they will face consequences for failing to represent their child-clients well. A move from granting absolute immunity to only granting qualified immunity should be made in the interest of public policy to protect children involved in the judicial process.

1. Qualified Immunity as an Affirmative Defense

Granting qualified immunity as opposed to absolute immunity will provide more just results as it would permit a child to bring a claim against the guardian and force the guardian to defend his or her actions as opposed to the case being summarily dismissed merely because the guardian can show that he or she acted within the scope of his or her duties. An injured child would have to satisfy all the elements of a negligence claim, raising and proving that a guardian had a duty, breached that duty, and proximately caused his or her injuries. However, as a response, unlike the current system, where even if a child can show all these elements, the case would not be summarily dismissed but a guardian would be forced to respond to the allegations and present a defense of his or her actions. In this circumstance, qualified immunity would serve as an affirmative defense against claims made in the complaint.¹³⁶ With a qualified immunity defense, a court can only dismiss the case if, inferring all facts in a light favorable to the plaintiff, it appears that the guardian performed his duties adequately. In cases where a child alleges that a guardian negligently performed his or her duties, the guardian should not be granted absolute immunity, thus barring the suit from continuing any further, but should be granted qualified immunity.

¹³⁴ABA STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN *STILL AT RISK* 204-05 (2001). See also Elrod, *supra* note 127, which also uses this quote.

¹³⁵Shepherd, *supra* note 27 at 1925.

¹³⁶Thomas, *supra* note 17.

Thus, using the facts from *Marr* to illustrate, Christy Marr could bring suit on behalf of Logan against Irwin alleging negligent representation. She would have to prove that Irwin had a duty to Logan, and that he breached that duty, which caused her to sustain injury. In response to these allegations, Irwin would have to present an affirmative defense and attempt to show that he adequately performed his duties when determining what action was in Logan's best interest. If Irwin presents sufficient evidence to show satisfactory fulfillment of his duties and no genuine issues of material fact exist, the case may be dismissed on summary judgment. Conversely, if Irwin fails to show adequate completion of his duties, the case would proceed to trial, giving Christy and Irwin the opportunity to fully present allegations or defenses.

Therefore, if guardians chose to perform their duties adequately, granting qualified immunity will continue to serve as a protection against the fear of unfounded claims by "disgruntled"¹³⁷ parents for cases in which the guardian can show adequate performance of his or her duties can be dismissed on summary judgment.¹³⁸ This result provides the injured child with more of a remedy than immediate dismissal of their claims based on absolute immunity, in which no response to the substantive allegations must be presented.

2. Determining Adequate Performance of Duties

Due to the complexity of the cases in which guardians are often involved, assessing whether they made a bad or erroneous decision would be time consuming and ineffective in determining negligence. Consequently, a court should not equate negligent performance with bad decisions that have resulted in injury, but should assess the methodology that the guardian used in reaching that decision. To determine whether a guardian used proper methodology in determining what action was in the best interest of the child, the court should compile a list of recommended duties that every guardian should comply with when acting to determine best interest. The ABA¹³⁹ and others¹⁴⁰ have compiled such lists. For example, when attempting to determine what action is in the best interest of the child, the ABA recommends some of the following suggestions: visit the child's home and talk with all the adults in the household, visit other regular caretakers, visit the child's school as teachers are often able to give insight, obtain a child's medical records, and talk to the child in a neutral setting so that he or she will feel comfortable to speak candidly.¹⁴¹ Adopting standards that a guardian should follow when attempting to determine best interests can also provide guidance to guardians, who are confused about what types of activities they should be undertaking to assess the situation.

¹³⁷*Short*, 730 F. Supp. at 1039.

¹³⁸Keeping in mind that this process may require the attorney to expend time and money to defend himself or herself in this way, the result is more fair to the parent alleging the wrong as opposed to summary dismissal where the parent is not given the opportunity to hear the guardian's defense.

¹³⁹ABA STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, *supra* at 134.

¹⁴⁰National Legal Research Group, Inc., *Malpractice Liability of a Guardian ad Litem*, at <http://www.divorcesource.com/research/dl/guardian/95may107.shtml> (last visited on February 8, 2004).

¹⁴¹*Tebo*, *supra* note 50.

In adopting this system, any guardian who in good faith performs the recommended duties will be protected by qualified immunity even if the guardian's recommendations when measure by hindsight did not serve the child's best interest. The case can be summarily dismissed by the court because genuine issues of material facts will not exists as to the guardians methodology. Conversely, those guardians who cannot show adequate compliance with the suggested duties will be forced to further defend their actions at trial.

While many guardians do perform their duties respectably and with good faith efforts, there are some who do not. The system that provides no relief to a child who is injured due to negligent representation by a guardian is flawed. Because guardians are representatives of those "lacking the ability to represent himself or herself,"¹⁴² they should at least adhere to established standards by which all other attorneys are bound if they negligently represent a client.

The implementation of the qualified immunity theory would render the following quote void: "Family law practitioners who undertake the responsibility of guardian ad litem may rest easier that they need not face the wrath of disgruntled parents or relatives"¹⁴³ On the contrary, those who undertake the responsibility of a guardian and fail to adequately represent the child should fear the wrath of parents whose child was subsequently injured or even killed as a result of that negligence. We should not accept a system, which allows attorneys to negligently represent children who are in need of counsel. Indeed, bad representation may be worse than no representation as it presents the illusion that the child has been adequately represented when in fact no such protection has been provided.

VII. CONCLUSION

"It's about how much we respect the lives of kids and how seriously we take our mandate to help them."¹⁴⁴

A number of suggested changes have been proposed in this note. First, the role of guardian should be defined in each particular case via references to statutes, court rules, and judge's specific orders. Second, the guardian needs to engage in continuing education and be provided with ongoing resources and support. Finally,

¹⁴² ARNEST, *supra* note 33.

¹⁴³ National Legal Research Group, Inc., *supra* at 140.

¹⁴⁴ Tebo, *supra* note 50. Author Margaret Tebo, quotes Ann Haralambie in this article. Ann Haralambie speaks on juvenile law issues at conferences across the country and she also serves on the ABA committee of the Family Law Section that has proposed standards of practice for guardians ad litem in private custody disputes. The quotation is taken from a discussion about the problems of representing abused and neglected children. Tebo explains that Haralambie, when speaking at conferences across the country, sometimes opens her presentations by "asking how many audience members were themselves abused or neglected as children." She then goes on to ask whether those child advocates would recommend removing a child from home today if they were treated as the advocates had been. Haralambie states that most of the hands stay up; however, when she asks "How many of you believe you would have been better off if you had been removed from your parents and placed into the child welfare system?" that most of the hands go down. Haralambie then states that this is the "dilemma that lawyers and judges face when handling cases to decide whether children should be placed into foster care."

absolute immunity should be reduced to qualified immunity, with a substantive law change to establish that a guardian has not been negligent if he or she can show to satisfaction of the court that he or she complied with the required methodology.

The purpose of suggesting changes to current guardian ad litem procedures is to ensure that guardians provide adequate representation for the protection of children. There are currently many guardians who provide stellar representation for their child-clients. However, because the guardian is such a crucial part of the decision making process as the guardian is the only party that can give a forthright, unbiased opinion as to what is truly in the best interest of the child, the court system needs to ensure that guardians understand the role to be performed is of the utmost importance. Furthermore, it should be clear that guardians who choose not to adequately perform the duties implied in the appointed role be liable for that negligence. The importance of the duties that a guardian has cannot be stressed enough. Neither the overburdened social worker, who must consider budgetary and placement restrictions, nor the parents, who are often too emotionally involved to clearly evaluate the situation, have the ability to focus on what is truly in the best interest of the child; the guardian serves a role that no other can. Therefore, assuring that guardians effectively perform their duties is imperative in protecting a child's welfare. Those who fail to adequately perform the duties necessary to protect the children whom they represent should suffer the consequences of those actions.

Hopefully, with the clear provision of the responsibilities and the role that a guardian should perform, provision of enhanced training and access to information and ongoing resources and support, which explain how to undertake those responsibilities, and with the threat of liability in place should one fail to undertake those responsibilities, the guardian system will function more effectively. When dealing with children and those incapable of defending themselves, attorneys who undertake the job to protect the child's best interests should at minimum provide adequate legal representation. Attorneys who are not serious about the job, or find that the lack of compensation does not warrant the amount of work, should decline to continue representation as a guardian, as children that are in this situation in the first place are most likely extremely vulnerable and need somebody to represent them well. Attorneys who take on the role of guardian should realize the importance of their role and perform accordingly. As the very definition of guardian is "one that guards, watches over, or protects,"¹⁴⁵ all who undertake the role of a *guardian ad litem*, should be required to and should expect to do just that.

INGA LAURENT¹⁴⁶

¹⁴⁵This definition was provided by an on-line website called "Your dictionary.com" Following is the address of that website: <http://www.yourdictionary.com/ahd/g/g0297800.html> (last visited on February 8, 2004).

¹⁴⁶Inga Laurent is Managing Editor of the *Cleveland State Law Review*, Cleveland-Marshall College of Law. The author would like to extend a special thank you to Professor Susan Becker who provided so many wonderful, helpful, and elucidating comments and thoughts for this note.